No. 80-780

ALEXANDER L. STEV
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROWAN COMPANIES, INC., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government seeks authority to expand the commonly-understood narrow definition of "wages" as used in the context of social security (FICA) and unemployment (FUTA) taxes because of "the broad social welfare goals of the Social Security program" (Gov't Br. 7-8). It brings to this Court once again as it did in *Central Illinois Public Service Co.* v. *United States,* 435 U.S. 21 (1978), the argument that "wages" may be expansively and sweepingly defined to include "a broad range of personal benefit items," so long as they are "provided without charge by an employer to its employees, where such benefits arise out of the employer-employee relationship" (Gov't Br. 16-17). It additionally urges (Gov't Br. 15) that the need to maintain the "solvency of the social security trust fund" justifies the FICA and FUTA taxability of noncompensatory items such as employer-furnished meals and lodging, and further suggests that a failure to treat such noncompensatory items as "wages", even though such items are admittedly not "wages" for purposes of income tax withholding, would impair the Social Security Act's "attack on recognized evils in our national economy" (Gov't Br. 16). It attempts to distinguish the exclusion of meals and lodging furnished for the convenience of the employer from "wages" for income tax withholding on the ground that the exclusion for income tax withholding is based on the fact that such meals and lodging are not subject to income tax; it thus ignores the fact that in *Central Illinois,* the Court held reimbursements for meals not to be "wages" subject to income tax withholding even though admittedly subject to income tax. The Government also claims that because of the "particularized social goals"[1] of the social security system, the *employee* portion of the FICA tax, which is statutorily defined to be a tax on "income"[2]

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[1] Gov't Br. 30, fn. 22.

[2] See Pet. Br. 27-30.

can nonetheless be imposed by an interpretative regulation on an item that is not income to the employee. For the reasons set forth in Petitioner's opening brief and herein, these assertions disregard the intent of Congress in choosing "wages" as the identical basis for FICA, FUTA and income tax withholding and in narrowly defining such term to include only "remuneration" for services or employment. The decision of the court below improperly permits noncompensatory meals and lodging furnished by Petitioner to its employees to be taxed as FICA and FUTA "wages" even though they were unquestionably not "wages" for income tax withholding.

A. The "Facilities or Privileges" Regulations Cannot Convert Noncompensatory Meals and Lodging Into "Wages"

The "facilities or privileges" regulations [3] which, according to the Government, produce FICA and FUTA taxability of the meals and lodging in question, provide that "facilities or privileges" furnished employees will not be considered "remuneration" if they are of "relatively small value;" however, meals or lodging are not "ordinarily", "facilities or privileges", since "generally" they constitute an "appreciable" part of the total remuneration of such employees. The regulations leave open several key points: do they purport to reach *all* meals and lodging, assuming appreciability, or only meals and lodging that happen to be *both* remuneration and "appreciable"? Can meals and lodging be "appreciable", yet not remuneration, but be subject to FICA and FUTA taxes, or does appreciability itself equal taxability, regardless of whether such meals and lodging are in fact remuneration?

In order to sustain the Government's position herein, the regulations have to compel taxability once the "ap-

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[3] Reg. §§ 31.3121(a)-1(f) and 31.3306(b)-1(f), Pet. Br. App. 3a, 4a.

preciable" threshhold has been reached[4]—without regard to whether the particular meals and lodging are remuneration for services rendered, because if the "facilities or privileges" regulations do allow for an analysis of the remunerative qualities of the particular meals and lodging, the Government's objection to the application of the "convenience of the employer" in FICA and FUTA tax situations is without foundation. Would a trip to Europe on an employer's business be "wages" because its value is appreciable in relation to cash compensation while a trip to the county seat for an identical purpose would not? Obviously the regulations cannot mandate FICA and FUTA taxability *solely* by reason of the appreciability of the item involved, because rather than being merely an "interpretation of the statute"[5] as claimed by the Government, this would result in a clear change by regulation alone of the statute without Congressional action or approval.[6]

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[4] It is interesting to note that in determining the relative value of meals and lodging to cash compensation paid Rowan's offshore employees, the Government refers only to the lowest paid of Rowan's employees ($577 per month) and ignores employees receiving cash compensation up to $1,181 per month (J.A. 28a), while acknowledging that the meals and lodging furnished both were identical (Gov't Br. 3, fn. 3; 4, fn. 5; 38, fn. 33).

[5] See Gov't Br. 11.

[6] Petitioner does not agree with the Government's contention (Gov't Br. 11) that "there is no room for debate on whether the [1940] Regulations . . . are applicable" so as to make the meals and lodging here taxable under FICA and FUTA, in light of its own conclusion in Rev. Rul. 57-471, 1957-2 Cum. Bull. 630, "explaining [1940] Treas. Reg. 106 . . . and . . . 107" (Gov't Br. 17, fn. 11), that with some exceptions not applicable here, S.S.T. 302, 1938-1 Cum. Bull. 456, holding meals furnished for the convenience of the employer *not* subject to FICA and FUTA, was still in effect 17 years after issuance of such regulations. Furthermore, as stated by the Court of Claims, even in the absense of a specific "convenience of employer" test in the regulations, there still re-

As set forth in our opening brief,[7] the convenience of employer test has been part of our Federal taxing system since 1919, 16 years before the enactment of the social security and unemployment taxes. During all these years, meals and lodging furnished for the convenience of the employer were repeatedly held in the cases and rulings not to be taxable as "income" in the face of statutory language defining "income" as specifically including "wages."[8] Had Congress chosen in 1935 to use as a tax base for social security and employment tax purposes all "personal benefit items" furnished an employee by an employer, as claimed in the Government's brief,[9] the Government's present argument that Congress intended to abandon traditional income tax concepts such as the convenience test in determining the proper FICA and FUTA tax base would have some force. Instead, Congress specified the tax base for these purposes to be "wages", a term that has been described by this Court as having a "well understood" meaning[10] which is "intentionally narrow and precise";[11] furthermore, the employee portion of the FICA tax[12] is imposed [only] on the *"income"* received by the employee, limited to his "wages", with

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mains the question of whether *"remuneration" is involved,* and that, in turn requires the court to consider "whether the employer furnishes free meals *primarily to effectuate his own policies,* or to sweeten the pot for employees." (Emphasis added). *Hotel Conquistador, Inc.* v. *United States,* 597 F. 2d 1348, 1353 (Ct.Cl., 1979).

[7] Pet. Br. 6-8.

[8] The rule was codified in 1954, but there has been no time since 1919—so far as Petitioner has been able to determine—in which the Government has claimed that meals or lodging furnished for the convenience of the employer constitute income. Pet. Br. 6-8, 12-13.

[9] See Gov't Br. 16-17.

[10] *Social Security Board* v. *Nierotko,* 327 U.S. 358, 369 (1946).

[11] *Central Illinois Public Service Co.* v. *United States,* 435 U.S. 21, 31 (1978).

[12] I.R.C. Section 3101(a), Pet. Br. App. 1a. See Pet. Br. 27-30, and *infra,* pp. 17-18.

Congress specifying at the same time that the base for the employer portion of the tax was to be identical.[13]

In this light and when coupled with the income tax withholding system enacted seven years later with Congress again adopting "wages" as the operative tax base, a heavy burden should be on the Government to justify why its regulations pertaining to meals and lodging are not *identical* for all the employment taxes, FICA, FUTA and income tax withholding. The Government's argument that social policy considerations justify the differing, and in fact, conflicting, regulatory treatment of meals and lodging as "wages" among the various employment taxes is an improper arrogation of statutory authority, in clear contrast to the Government's acknowledged[14] duty to promulgate regulations designed to implement the Internal Revenue Code "in some reasonable manner." See *United States* v. *Correll,* 389 U.S. 299, 307 (1967). It should be clear that however inartfully phrased,[15] the "facilities or privileges" regulations cannot create taxable "wages" where there is no income.

B. The "Facilities or Privileges" Regulations Cannot Override the Intent of Congress That "Wages" Have the Same General Meaning for FICA, FUTA and Withholding On Income Taxes

In its discussion of the Congressional intent underlying the enactment of the FICA and FUTA taxes,[16]

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[13] The Ways and Means Committee Report stated (H. Rep. No. 615, 74th Cong., 1st Sess. 30 (1935):

> "Like the tax on employees under section 801, this tax [excise tax on employers] does not apply to all wages or employments but only to those defined as such in section 811."

See also S. Rep. No. 628, 74th Cong., 1st Sess. 42 (1935).

[14] See Gov't Br. 10-11.

[15] The Court of Claims has characterized these regulations as being "nearly worthless" as a guide to employers in their relations with employees. *Hotel Conquistador, Inc.* v. *United States,* 597 F.2d 1348, 1354 (Ct. Cl., 1979).

[16] Gov't Br. 13-27.

the Government repeatedly mischaracterizes the *income* tax imposed on employees by labelling it, inaccurately, as an "excise"[17] tax. Its companion tax, the employer portion of FICA, is in fact an excise tax as is FUTA, and all three taxes, plus the withholding on income tax, are lossely referred to as "employment" taxes. All four taxes have a common base, "wages". The rates and coverage of the four taxes vary,[18] all by reason of specific *Congressionally* enacted statute—not by Government regulation, but all of the four "employment" taxes define their common "wage" base to be "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash" (FICA and FUTA),[19] or "all remuneration . . . for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash" (withholding on income).[20] The Fourth[21] and Seventh[22] Circuits and the Government on brief to the Fourth Circuit[23] have stated these definitions of "wages" to have the same essential meaning, and the Seventh Circuit has specifically held that this Court's narrow construction of the term "wages" in *Central Illinois* in the context of income tax withholding is equally applicable for FICA and FUTA tax purposes.[24]

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[17] Gov't Br. 7, 15.

[18] See Gov't Br. 37-38.

[19] I.R.C. Sections 3121(a), 3306(b). Pet. Br. App. 2a.

[20] I.R.C. Section 3401(a). Pet. Br. App. 2a-3a.

[21] *Royster Co.* v. *United States*, 479 F.2d 387, 390 (C.A. 4th, 1973).

[22] *Oscar Mayer & Co.* v. *United States*, 623 F.2d 1223, 1227 (C.A. 7th, 1980).

[23] Gov't Brief, p. 6, in *Royster, supra*, discussed at pp. 18-19 of Pet. opening brief herein.

[24] *Oscar Mayer & Co.* v. *United States*, 623 F.2d at 1227.

The Government's suggestion[25] that Congress intended the term "wages" to convert noncompensatory "personal benefit items" received by employees into taxable compensation for FICA and FUTA tax purposes has neither basis nor logic for support. Although it says that Congress defined the "wages" base in "broad and expansive terms," and that the current FICA/FUTA regulations are "consistent with the legislative history,"[26] it nowhere establishes such assertion to be true. It quotes for example (Gov't. Br. 17, 29 and 37, fn. 32) the 1935 Committee reports that:

> "Wages include not only the cash payments made to the employee for work done, but also *compensation for services in any other form,* such as room, board, etc. (Emphasis added.)

The Government then jumps to the conclusion that *all* "room and board" is subject to tax; the language quoted makes clear, however, that they are taxable only if they are "compensation"; as pointed out by the court in *Conquistador,* even "the regulation admits that not all food and lodging benefits are 'remuneration.' " 597 F.2d at 1353.

This Court has emphasized that "wages" is a "well understood word"[27] which Congress chose as a taxing standard because it is "intentionally narrow and precise".[28] This is the identical standard on which Congress chose to base the withholding on income tax system, and just as noncompensatory meals and lodging are excluded from wages for income tax withholding, so Congress intended they be excluded for FICA and FUTA tax purposes. For the Government to argue that noncompensatory meals and lodging should be treated

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[25] Gov't Br. 16-17.

[26] Gov't Br. 7, 8, 29.

[27] *Social Security Board* v. *Nierotko,* 327 U.S. 358, 369 (1946).

[28] *Central Illinois Public Service Co.* v. *United States,* 435 U.S. at 31-32.

as wages for FICA and FUTA tax purposes but not wages for withholding tax purposes contradicts not only the intent of Congress in using the identical word "wages" (and essential identical definitions of such word) for the applicable tax bases, but also its clearly stated intent that the "collection, payment, and administration of withholding" were to be "coordinated generally" with the employee FICA tax.[29] This is particularly true in light of the fact that when the FICA and FUTA taxes were first enacted in 1935, it had been repeatedly held for 16 years that meals and lodging for the convenience of the employer were not included in the base of the income tax, even though the income tax statutes similarly specified "wages" to be included in the tax base. See Pet. Br. 6-8. The Government's argument also contradicts the present understanding of Congress as to the identical treatment of meals and lodging for all employment tax purposes.[30]

The Government's repeated references to the social needs served by the FICA and FUTA taxes[31] simply have no bearing on the issue before this Court. This case does not involve in any way a question as to the validity or necessity for such taxes, but instead addresses again, as in *Central Illinois*, the limited question of what Congress intended the term "wages" to mean. The Government's claim that the social purposes underlying the FICA and FUTA taxes warrant the distortion by regulation of the plain meaning of such term to increase FICA and FUTA revenues is patently without foundation. It is also directly contrary to the very intent of Congress in selecting "wages" to be the identical tax base for FICA, FUTA and withholding

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[29] H.R. Rep. No. 510, 78th Cong., 1st Sess. (1943), at 28. See Pet. Br. 9-11, 36-38.

[30] See Pet. Br. 12-13, fn. 10; p. 11, fn. 38, *infra*.

[31] See Gov't Br. 7, 8, 15, 16-17, and 29.

on income taxes. To suggest, as the Government does,[32] that the social security and unemployment taxes fund more laudable activities than those funded by other tax revenues, and accordingly justify a different interpretation of a term deliberately chosen by Congress as common to both types of taxes, approaches the absurd.

It is clear both from a reading of the FICA and FUTA statutes and from this Court's decision in *Nierotko*[33] that Congress did not delegate to the Government the ability to determine what is or is not subject to FICA and FUTA taxes; Congress provided that only "wages", or remuneration for employment, is taxable. Nonetheless, the Government continues to assert, erroneously, that it has been granted authority to issue "legislative" regulations defining what is or is not "wages,"[34] notwithstanding an unquestionable absence of such grant. Without dwelling on this error it is interesting to note the Government's ready acknowledgement in another setting where it would serve the Government's interest to assert otherwise, that regulations issued under Section 7805[35] of the Code are in fact "interpretative", and not "legislative" as claimed by the Government herein. See Brief for the United States as *amicus curiae,* pp. 19-20, fn. 12, *Alessi, et al.* v. *Raybestos-Manhattan, Inc., Buczynski, et al.* v. *General*

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[32] See Gov't Br. at 7-8, 15.

[33] 327 U.S. at 368, 369.

[34] See Gov't Br. 12-13, 19-20.

[35] When the social security and unemployment tax provisions were incorporated into the Internal Revenue of 1954, the authority to issue regulations with respect to such taxes was transferred to Section 7805 "without any change in meaning or scope." See Gov't Br. 19, fn. 14. Unlike situations elsewhere in the Internal Revenue Code where the Treasury has been granted specific authority to issue legislative regulations, regulations issued under the general authority of Section 7805 are merely interpretative. See Pet. Br. 30-31.

Motors, Sup. Ct. Nos. 79-1943, 80-193, now pending before this Court.

The Government's contention that because the "facilities or privileges" regulations have been in their present form since 1940,[36] Congress is deemed to have approved the asserted prohibition of the convenience doctrine by such regulations for FICA and FUTA tax purposes, simply does not bear analysis. First, the Government has continuously recognized the applicability of the convenience doctrine to FICA and FUTA wage determinations by regulation or published ruling from 1936 to 1962. Regulations 90, Art. 207, issued in 1936, stated the convenience test to apply to the unemployment tax; S.S.T. 110, 1937-1 Cum. Bull. 440, held the test to be applicable for both FICA and FUTA taxes with respect to "supper money"; S.S.T. 302, 1938-1 Cum. Bull. 456, stated the convenience test to apply generally to meals for FICA and FUTA taxes; and Revenue Ruling 57-471, 1957-2 Cum. Bull. 630, held that S.S.T. 302 was "still in full force and effect," although with some exceptions not applicable to Petitioner. Thus, contrary to the Government's claim of an "unbroken line of published rulings, beginning . . . in 1940" (Gov't Br. 30) and a "consistent" reaffirmation of a difference between the meaning of "wages" for FICA, FUTA and income tax withholding (Gov't Br. 31), it was not until 1962, twenty-two years after the issuance of the "facilities or privileges" regulations as currently worded, and eight years after the enactment of the 1954 Internal Revenue Code, that the Govern-

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[36] The suggestion (Gov't Br. 25) that the change in Regulations 106 and 107 in 1940 to omit the convenience of employer language was occasioned by the Social Security Act Amendments of 1939 is erroneous; the definition of "wages" as being "all *remuneration* for employment, including the cash value of all *remuneration* paid in any medium other than cash" (emphasis added) was unchanged by the 1939 Amendments.

ment first announced that it considered the convenience doctrine to be after 1962 "*no longer* a test for Federal employment tax purposes." [37] With this history, it is difficult to see how Congress could have even understood the Government's present position as to the purported effect of the "facilities or privileges" regulations, let alone have approved such effect.

Second, it is clear that the Congress as recently as 1978 did not understand the "facilities or privileges" regulations to mandate FICA and FUTA taxability of an item which is excluded from the income of an employee.[38] In sum, the Government's claim that these regulations have "for more than 40 years . . . consistently rejected the applicability of the convenience-of-the-employer exclusion to the definition of 'wages' " [39] and are therefore entitled to "special deference" due to Congressional approval [40] has a hollow ring.

The Government's reliance on *Pacific American Fisheries* v. *United States,* 138 F.2d 464 (C.A. 9th, 1943) is also misplaced.[41] The Ninth Circuit did *not*

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[37] Rev. Rul. 62-150, 1962-1 Cum. Bull. 213. The Government continues to recognize the convenience test as being applicable to *one* employment tax, i.e., withholding on income tax. See Gov't Br. 28-29.

[38] See Pet. Br. 12-13, fn. 10. The Government's response (Gov't Br. 42, fn. 35) to this colloquy of Senators Dole and Long merely reinforces our position that the Government misperceives the Congression view of the treatment of noncompensatory meals and lodging for FICA and FUTA tax purposes. It is clear that they thought that if meals and lodging were furnished for the convenience of the employer, they necessarily were not remuneration subject to income tax in the hands of the employee or subject to FICA, FUTA, or income tax withholding.

[39] Gov't Br. 26.

[40] See Gov't Br. 19-20.

[41] The Government's reference (Gov't Br. 22, fn. 17) to two state unemployment cases, *California Employment Commission* v. *Black*

state that the convenience of the employer test was inapplicable to social security taxes; it merely stated the *possibility* that "what might not be taxable income for income tax purposes might constitute wages under the provision of the Social Security Act." 138 F.2d at 465. The court never concluded this to be the case. Instead, the court's decision was based on the point that a 50% differential in cash compensation to the particular workers receiving board and lodging "strongly indicates that board and lodging were part of the wages and *not merely for the convenience of the employer.*" 138 F.2d at 466. (Emphasis added.) Clearly, the Ninth Circuit applied the convenience of the employer test to the meals and lodging involved in that case and determined that factually such meals and lodging failed to meet the requirements of the test because they were furnished in lieu of additional cash.[42]

The Government asserts that Regulations 90 and published rulings applying the convenience test were

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Foxe Military Institute, 43 Cal. App. 2d 868, 110 P.2d 729 (App. Dep't Super. Ct. 1941), and *Worthington Constr. Co.* v. ***Employment Sec. Div., A.D.L.,*** 413 P.2d 929 (Alaska, 1966), provide no additional support. In ***Black Foxe,*** a decision of the state employment commission finding on the facts that meals and lodging were compensatory and ***not*** for the convenience of the employer was upheld. The holding in ***Worthington*** by the Alaska Court relied solely on dicta in ***Black Foxe*** and ***Pacific American Fisheries*** as authority and has no independent basis apart from those cases.

[42] *Goldsboro Christian Schools, Inc.* v. *United States,* 436 F.Supp. 1314 (E.D.N.C., 1977), subsequent opinion 43 A.F.T.R.2d (P-H) ¶ 79-473 (E.D.N.C., 1978), aff'd per curiam, No. 80-1473 (C.A. 4th, 1981), was also decided on its facts, with the district court finding that off-campus residences provided by a school to certain of its teachers were ***not*** provided for the convenience of the employer but rather as additional remuneration. The value of such residences were therefore taxable as "wages" for FICA, FUTA and withholding on income taxes.

"short-lived"[43] and do not "undermine"[44] the Government's position herein. The Government also seeks to bolster its position by pointing out that although Regulations 90 specifically adopted the convenience test for the unemployment tax, Regulations 91, applicable to the social security tax, did not.[45] In response, the Government's analysis in S.S.T. 302 of this situation is worth noting. After citing Article 207 of Regulations 90 which set forth the applicability of the convenience test, S.S.T. 302 stated (1938-1 Cum. Bull. at 457):

> "Article 14, Regulations 91, promulgated under Title VIII of the Act, contains provisions which, while not identical, have been given a *like* interpretation." (Emphasis added.)

Contrary to the Government's repeated suggestion that meals and lodging for the convenience of the employer have been treated as subject to FICA and FUTA tax by the Government for "more than 40 years"—from 1940 on (Gov't Br. 5, 7, 8 (twice), 10, 17, 20, 26, 30, 33)—*the Government's "short-lived" recognition of the convenience doctrine for FICA and FUTA purposes in fact spanned twenty-six years* from 1936 with the issuance of Regulations 90, *to 1962* with the revocation of S.S.T. 302 by Revenue Ruling 62-150, 1962-2 Cum.

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[43] Gov't Br. 25.

[44] Gov't Br. 26-27.

[45] Regulations 91, Art. 14, in pertinent part, stated:

> "Ordinarily, facilities or privileges (such as entertainment, cafeterias, restaurants, medical services, or so-called 'courtesy' discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for services if such facilities or privileges are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees."

The "convenience of the employer" test, though not specifically mentioned, would appear applicable even under this language. Social Security Board Regulations 2, Art. 13 (Fed. Reg. July 23, 1937, p. 1526, 1530), had the identical language.

Bull. 213. We submit that whatever weight might otherwise be given by this Court to current administrative interpretations—whether by regulation or ruling—is not warranted in this case due to both this sustained recognition of the convenience test and the inconsistency by the Government in its treatment of the convenience test in the context of FICA, FUTA and withholding taxes, all occurring without any change whatsoever in the underlying statutes. The Government is not merely changing the "interpretation" of "wages" in light of administrative experience" as it suggests (Gov't Br. 27), but instead is asserting its ability to determine by administrative fiat something to be "wages" one day, and not be "wages" another day, without Congressional approval. The decision of the court below improperly enables the Government to do so and should therefore be reversed.

C. Noncompensatory Meals and Lodging That Are Excluded From Income Are Similarly Excluded From Wages For FICA and FUTA Tax Purposes

The Government claims that the convenience of employer doctrine is inapplicable to FICA and FUTA taxes due to a lack of "specific statutory or regulatory authority." (Gov't Br. 29.) Petitioner submits that, given the *sixty-two* year history of this doctrine—already established by cases and rulings for thirty-five years before being codified in 1954 as Section 119 of the Internal Revenue Code—and the fact that "wages" (merely one type of income) was chosen by Congress as the tax base for all four "employment" taxes, and defined in substantially identical terms for all such taxes, the convenience doctrine *is* applicable in determining whether meals and lodging are remuneration and thus "wages" for FICA, FUTA, and withholding tax purposes in the absence of contrary *Congressional* authority. It is unclear why the Government is so hostile to the application of the convenience test in

employment tax determinations. Nowhere is there any indication in any legislative history that Congress intended such hostility. The social purposes described at length by the Government in its brief as justifying the rejection of the convenience test, in fairness, provide no basis for treating a noncompensatory item as wages for one employment tax, and not as wages for another, in the absence of a specific statutory distinction, when Congress took pains to define "wages" for all employment taxes in such substantially identical terms. There is simply no basis for the Government's rejection of this test in the absence of Congressional approval.[46]

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[46] As indicated in Petitioner's opening brief (p. 34), the basis for excluding noncompensatory meals and lodging from "wages" is consistent with the Government's recognition that expenses incurred directly by an employer which, if paid by his employees would be deductible by such employees as ordinary and necessary travel expenses, are not "wages" for all employment tax purposes. See Rev. Rul. 76-71, 1976-1 Cum. Bull. 308. In this connection, there is no meaningful distinction between a driller in Petitioner's employ (who must maintain his own lodging facilities ashore for use when he is off-duty) being furnished food and lodging while working on an offshore rig for a 10-day shift, and a trainman (who must maintain his own lodging facilities somewhere when he is off-duty) being furnished food and lodging while working at his place of duty on the train which the Government recognizes would be free of FICA and FUTA tax. See Rev. Rul. 54-497, 1954-2 Cum. Bull. 75, Rev. Rul. 75-432, 1975-2 Cum. Bull. 60, and Rev. Rul. 76-71, *supra*. Both the driller and the trainman are away from their respective homes on business travel. The reason for exclusion of travel expenses from taxable "wages" for *all* employment tax purposes, as recognized by the regulations, necessarily rests upon the very reason cited by this Court in *Kowalski* for exclusion of meals and lodging for the convenience of the employer from "wages" for income tax purposes:

> ". . . though there was an element of gain to the employer, in that he received subsistence and quarters which otherwise he would have had to supply for himself, he had nothing he could take, appropriate, use and expend according to his own dictates, but rather, the ends of the employer's business dominated

The Government makes no attempt to reconcile its stated recognition in *Royster Co.* v. *United States,* 479 F.2d 387 (C.A. 4th, 1973), that "the term wages has the same meaning for all of the employment taxes,"[47] with its present position that noncompensatory meals and lodging are "wages" for social security tax purposes but not "wages" for income tax withholding purposes except to suggest that different regulations applied in *Royster* than in this case; as pointed out in Petitioner's Brief (p. 40, fn. 46) the *only* regulations referred to in the Government's brief in *Royster* (when it conceded that "wages" have the same meaning for FICA, FUTA and income tax withholding) are the *very* regulations involved here. Nor does the Government make any serious attempt to reconcile its repeated assertions to the Court of Claims and the court below that *Central Illinois,* involving the definition of "wages" in the context of income tax withholding, was "squarely in point" with wage determinations in FICA and FUTA tax cases and would have a "direct impact" thereon,[48] with its present position (Gov't Br. 8, 33) that *Central Illinois* "does not bear upon the FICA and FUTA tax question presented in this case." This Court determined in *Central Illinois* that the "expansive and sweeping" definition of "wages" urged by the Government there as here as including all personal benefits arising out of the employment relationship was inconsistent with the intent of Congress in selecting such a "narrow and precise" standard for the employment tax base; the Government nonetheless ignores this determination and once again urges this

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and controlled, just as in the furnishing of a place to work and in the supplying of the tools and machinery with which to work. The fact that certain personal wants and needs of the employee were satisfied was plainly secondary and incidental to the employment." *Commissioner* v. *Kowalski,* 434 U.S. 77, 89 fn. 21 (1977).

[47] See Pet. Br. 18-19.

[48] See Pet. Br. 19-20.

Court to redefine "wages" to include a "broad range of personal benefit items",[49] without regard to whether such items are remuneration for services and thus "wages" as required by statute. The Government also claims, erroneously, that this Court's decision in *Central Illinois* "turned on" a "pertinent Treasury Regulation." (Gov't Br. 33.)[50] If *Central Illinois* had been that simple, this Court would hardly have gone to such great lengths to reject the ' expansive and sweeping definition of wages" urged there (and here) by the Government, finding it to be inconsistent with Congressional intent of setting forth an "intentionally narrow and precise standard," or to explain that "wages" is a narrower term than "income." It more accurately appears that the Court's decision turned on an analysis of the definition of "wages" as set forth in Section 3401 of the Internal Revenue Code, and not on regulations, a reading that is supported by the concluding statement in the majority opinion (435 U.S. at 33):

> "This is not to say, of course, that the *Congress* may not subject lunch reimbursements to withholding if in its wisdom it chooses to do so by expanding the definition of wages for withholding. It has not done so as yet. And we cannot justify the Government's attempt to do so by judicial determination." (Emphasis added.)

The Government's attempt to deny that the employee FICA tax is in fact an *income* tax by suggesting[51] that

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[49] See Gov't Br. 16-17.

[50] The Government makes a similar erroneous claim as to the impact of regulations other than those involved here, in *Royster Co.* v. *United States*, 479 F.2d 387 (C.A. 4th, 1973). See Gov't Br. 34, fn. 30. Such regulations had absolutely no discernible impact as the Fourth Circuit did not refer to any regulation whatsoever at any point in its decision and the only regulation brought to its attention by the Government was that involved here. See Pet. Br. 40, fn. 46.

[51] Gov't Br. 30, fn. 22.

Helvering v. *Davis,* 301 U.S. 619 (1937), characterized such tax as other than a regular *income* tax subject to the general rules applicable to the determination of income is without foundation. In context, the use of the word "special" as applied by the Court to the FICA income tax appears to have no independent significance (301 U.S. at 634-635):

> "Title VIII. lays another excise upon employers in addition to the one imposed by title IX. (though with different exemptions). It lays a *special income tax* upon employees to be deducted from their wages and paid by the employers. . . . The plan of the two titles will now be summarized more fully.
>
> "Title VIII. as we have said, lays two different types of tax, an '*income tax* on employees,' and 'an excise tax on employers.' The *income tax* on employees is measured by wages paid during the calendar year. Section 801. The excise tax on the employer is to be paid 'with respect to having individuals in his employ,' and, like the tax on employees, is measured by wages. Section 804. . . . The *income tax* on employees is to be collected by the employer, who is to deduct the amount from the wages 'as and when paid.' Section 802(a). . . . The proceeds of both taxes are to be paid into the Treasury like internal revenue taxes generally, and are not earmarked in any way. Section 807(a)." (Emphasis added.)

The further attempt of the Government to distinguish the conflicting wage determinations of the court below on the grounds that meals and lodging furnished for the convenience of the employer are FICA and FUTA "wages", but are not "wages" for income tax withholding purposes solely because they are not taxable income to the employee,[52] fails to account for this Court's determination in Central Illinois ***that the meals in issue there were not "wages" for withholding***

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[52] See Gov't Br. 28-29.

tax purposes even though they were admittedly income to the employees. The inescapable fact is that the statutory definition of "wages" is the same for FICA, FUTA and withholding taxes. If noncompensatory meals and lodging are not "wages" within the definition of withholding on income tax, perforce they are not "wages" within the FICA and FUTA tax definition. An item is excluded from "wages" if it is not income, as "wages" is merely one form of income; an item is also excluded from "wages" if it is not remuneration for services, but may still be taxable income to the employee as in *Central Illinois.* Within this context, the holding of the court below that noncompensatory meals and lodging, acknowledged to be excluded from income and not "wages" for income tax withholding, are nonetheless remuneration for services and thus "wages" for FICA and FUTA tax purposes, is in error.

There is no justification for the inconsistent and conflicting treatment accorded noncompensatory meals and lodging by the Government.[53] The resulting complexities that would be added to the employer's recordkeeping responsibilities by such treatment are substan-

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[53] Had Petitioner incurred the additional expense of transporting its crews back to shore so they could obtain meals and lodging each day at their own expense, it is clear that the added transportation expense so incurred by Petitioner would not be "wages" to its employees. Such additional cost would have been approximately $25 per day per man, as opposed to the $6 per day per man cost actually incurred by Petitioner in providing meals and lodging on the drilling rig (See Pet. Br. 3). Based on comparative cost alone, prudent business economy would dictate that the less expensive alternative be selected as a convenience, and savings, to the employer. It is plainly unreasonable for the Government to assert that a payment of "wages" result from the selection of the less costly alternative but not from the more costly, when the alternatives are functionally identical employment costs.

tial. Additionally, the potential for dispute as to particular items received by an individual employee and the value thereof to be charged to that employee for FICA and FUTA—but not income tax withholding—purposes is significant.[54] This by no means comports with the expressed intent of Congress that the "methods of collection, payment, and administration of the withholding tax" were to be "coordinated generally with those applicable to the Social Security tax." [55] Congress created the identical taxable base for all four employment taxes and the Government is without authority to alter such base. The decision of the Court below should be reversed.

Respectfully submitted,

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[54] Contrary to the Government's suggestion (Gov't Br. 36-37, fn. 32), the "fair value" of asserted taxable items is not "commonly" resolved by the Internal Revenue Service consistent with state-established standard values. A case in point can be found in *Hotel Conquistador* where notwithstanding that the Nevada Wage and Hour Law (Chap. 609, Nev. Rev. Stat.) provided that for minimum wage purposes, meals were to be valued at $.35, $.45 and $.75 for breakfast, lunch, and dinner, respectively, and Rule 1 of the Nevada Employment Security Department specified respective values of $.25, $.35 and $.45, the Government nonetheless asserted that the meals in issue had a value of $1.25 each. See *Hotel Conquistador, Inc.* v. *United States*, 597 F.2d at 1350.

[55] See pp. 7-8, *supra*.